STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, LOCAL NO. 1604, Complainant,	)	CASE 7143-U-87-1458
vs.	)	DECISION 3156-A - PECB
CITY OF BELLEVUE, Respondent.	)	DECISION OF COMMISSION

Webster, Mrak and Blumberg, by James H. Webster and Lynn D. Weir, Attorneys at Law, appeared on behalf of the complainant.

David Kahn, Assistant City Attorney, appeared on behalf of the employer.

International Association of Fire Fighters, Local 1604, filed an unfair labor practice complaint and amended complaint with the Public Employment Relations Commission, alleging that the City of Bellevue violated RCW 41.56.140(1) and (4), by unilaterally adopting new civil service rules which changed conditions of employment of bargaining unit employees with regard to hiring, discipline, layoff, recall, promotion, transfer and appeal rights.

Our Executive Director issued a preliminary ruling holding that certain allegations in the amended complaint did not state a cause of action, as they related to "new hires", promotions outside of the bargaining unit, or delegation of authority among management officials. The remaining allegations were heard by Examiner William A. Lang, who issued his findings of fact, conclusions of law and order on March 10, 1989. The Examiner found that an unfair labor practice was committed, and he ordered the City of Bellevue

to cause the rules changes to be rescinded. The Examiner also ruled that the employer's defenses were frivolous, and he therefore awarded the union its reasonable attorney fees and costs.[1] The employer filed a timely petition for review, bringing the matter before the Commission.

BACKGROUND

The union is the exclusive bargaining representative of a bargaining unit of "uniformed personnel" employed by the City of Bellevue as fire fighters, lieutenants and captains. The employer and union have had a series of collective bargaining agreements.

The Bellevue Police and Firemen Civil Service Commission was established by ordinance of the Bellevue City Council in 1973, to "substantially accomplish the purpose of RCW 41.08 and RCW 41.12". Those two state statutes authorize the creation of civil service systems for police and firefighters, respectively. The Bellevue Civil Service Commission, composed of five members appointed by the city manager for six-year terms, is to "exercise the powers and perform the duties established by state law in connection with the selection, appointment, promotion, demotion and employment of firemen". The ordinance provides that Chapters 41.08 and 41.12 RCW shall control the actions of the Bellevue Civil Service Commission, "except as hereinafter specifically provided by rules and regulations of the Civil Service Commission."

Bellevue's city attorney provides legal counsel to the Bellevue Civil Service Commission. Under rules adopted by the Bellevue

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[1] In so doing, the Examiner relied upon the decisions in City of Bellevue, Decision 839 (PECB, 1980) and Decision 2788 (PECB, 1987), holding that matters delegated to the Bellevue Civil Service Commission are not exempted from mandatory collective bargaining by RCW 41.56.100.

Civil Service Commission, its secretary-chief examiner is a regular employee of the City of Bellevue, recommended by the city manager and confirmed by the Bellevue Civil Service Commission to perform the responsibilities of the secretary-chief examiner as a part of his or her duties as a City of Bellevue employee. Kerry Schaefer, the current incumbent of that position, also serves as assistant personnel director for the City of Bellevue.

On October 22, 1986, the Bellevue Civil Service Commission began an extensive review of its rules and regulations. By February of 1987, that body had completed its review, and a draft of new rules prepared by the secretary-chief examiner was circulated for comment to the union, among others. On March 25, 1987, the Bellevue Civil Service Commission began a series of public meetings, sometimes attended by union officials, concerning the proposed rules changes.

On June 17, 1987, the union advised the Bellevue Civil Service Commission that some of the proposed rules changes were claimed by the union to encompass mandatory subjects of collective bargaining, and were the same as the employer's positions on issues then being bargained between the employer and union. The union also noted that the proposals were different from the terms of the parties' most recent collective bargaining agreement. Finally, the union complained that some of the changes would result in outcomes favorable to the employer on issues then being litigated before the Public Employment Relations Commission. For those reasons, the union asked the Bellevue Civil Service Commission not to adopt the rules, and to refer them instead to the collective bargaining process.

The Bellevue Civil Service Commission did not reply to the union, but continued to discuss the proposals, which it adopted on November 2, 1987. These unfair labor practice charges followed, on November 18, 1987.

POSITIONS OF THE PARTIES

On review, the employer argues that: (1) Chapter 41.08 RCW authorizes bodies such as the Bellevue Civil Service Commission to adopt rules; (2) the Bellevue Civil Service Commission is not a "public employer" under RCW 41.56.030(1); (3) the Bellevue Civil Service Commission does not act "on behalf of" the employer, within the meaning of RCW 41.56.030(1); and (4) the Examiner erred in awarding the union its attorneys fees and costs, because the argument numbered (2), above, had never previously been presented to the Commission, and therefore could not be deemed a frivolous defense.[2]

The union contends that: (1) Chapter 41.56 RCW requires the employer to bargain civil service rules changes, if mandatory subjects are involved; (2) the Legislature has determined that Chapter 41.56 RCW prevails in the event of a conflict between the city's bargaining obligation and the authority provided in Chapter 41.08 RCW; (3) the Bellevue Civil Service Commission clearly acts "on behalf of" the City of Bellevue; and (4) the Examiner's order for payment of attorney fees and costs was fully warranted.

DISCUSSION

There can be no serious contention that the civil service rule changes at issue here did not, for the most part, affect fire fighter "working conditions", as that term is used in the definition of "collective bargaining" found in RCW 41.56 .030(4).

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[2] Unlike the situation in City of Bellevue, Decision 839, supra, the employer does not contend here that its Civil Service Commission fits within the exception provided in RCW 41.56.100 for civil service commissions "similar in scope, structure and authority to" the State Personnel Board created by Chapter 41.06 RCW.

There is also no question that the City of Bellevue is a municipal corporation or political subdivision covered by RCW 41.56.020.

Does the Civil Service Commission Act "On Behalf Of"?

The first question framed by the employer involves the interpretation of RCW 41.56.030(1), which provides, in pertinent part:

> "Public Employer" means any officer, board, commission, council or other person or body acting on behalf of any public body governed by this chapter as designated by RCW 41.56-.020, or any subdivision of such public body. (emphasis supplied)

If we conclude that the Bellevue Civil Service Commission acts "on behalf of" the City of Bellevue, then its exercise of rule-making authority becomes an act of the City of Bellevue. Hence, the employer would be required to bargain the various mandatory subjects involved here.

The employer argues that the Bellevue Civil Service Commission does not act on behalf of the City of Bellevue. To support that contention, it relies on evidence that the members of the Civil Service Commission are not paid or employed by the city, that their decisions are not controlled by the city, that the Bellevue City Council does not vote on proposed civil service rules and regulations, that its duties are independent from those of the city, and that the Civil Service Commission has ruled against the City of Bellevue on occasion when acting in a quasi-judicial manner on discipline cases. While we would agree that the evidence does not demonstrate complete control of the Bellevue Civil Service Commission by the City of Bellevue, we find the evidence persuasive that the Bellevue Civil Service Commission nevertheless acts on behalf of the City of Bellevue for the purposes of RCW 41.56.030(1).

The Bellevue Civil Service Commission was created by ordinance of the City of Bellevue, and that ordinance can be changed at the will of the City Council. The budget for the Bellevue Civil Service Commission is provided solely by the City of Bellevue. The city manager of Bellevue appoints all five members of the Bellevue Civil Service Commission. The secretary-chief examiner is the deputy personnel director for the employer.

It might well be asked, "If the Bellevue Civil Service Commission does not act on behalf of the City of Bellevue, upon whose behalf does it act?" We do not believe that the relationship of master-servant or employer-employee is the lodestar of the "acting on behalf of" language found in RCW 41.56.030(1). Were that the intention of the Legislature, the provision could have been limited to "officer" or, perhaps, "officer or employee". The employer's argument would render meaningless the inclusive "any . . . board, commission, council or other person or body" terminology actually used by the Legislature.

Nor do we believe that strict "agency" principles apply. The word "agents" does not appear in the provision before us. Instead, the phrase "acting on behalf of" was utilized. This suggests that the finding of a strict agency relationship is not necessary for purposes of the "public employer" definition. Even if it were, RCW 41.56.122 gives some indication of legislative intent in this area. While expressly authorizing union security provisions in collective bargaining agreements, that section goes on to state:

> When there is a conflict between any collective bargaining agreement reached by a public employer and a bargaining representative on a union security provision and any charter, ordinance, rule, or regulation adopted by the public employer <u>or its agents, including but not limited to, a civil service commission</u>, the terms of the collective bargaining agreement shall prevail. (emphasis supplied)

Thus, it appears that the Legislature considered civil service commissions to be agents of the public employer for at least some purposes under Chapter 41.56 RCW.[3]

Apart from the "structural" factors evidencing that the Bellevue Civil Service Commission acts on behalf of the City of Bellevue, the record establishes that the Bellevue Civil Service Commission was acting on behalf of the employer in its adoption of the disputed rule changes. It is clear that the Civil Service Commission's rule-making performs what would otherwise be a personnel function of the City of Bellevue. The secretary-chief examiner drafted the proposed rule changes. Many of those changes deal with promotion, layoff, recall, seniority, and discipline matters which clearly overlap the treatment of the same subjects in the collective bargaining agreement between the employer and union. We find merit in the union's contention that the employer would, by the disputed rules changes, modify the results obtained by the parties through collective bargaining under Chapter 41.56 RCW.

The Public Employees' Collective Bargaining Act is "remedial" legislation, designed to cover a broad range of public employers without need for their specific enumeration within the statute. Roza Irrigation District v. State of Washington, 80 Wn.2d 633 (1972). Without any doubt, the forms of organization of the public entities covered by the statute are widely varied. The exception in RCW 41.56.100 for matters delegated to civil service commissions and personnel boards is narrow, having been limited to bodies that

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[3] If the statute were otherwise, a union's effort to enforce a statutorily authorized union security clause (i.e., by seeking discharge of an employee who refused to pay required dues and fees) could be frustrated by the existence of employee "civil service" rights. Breach of union security obligations is not one of the accepted reasons for discharge stated in the civil service statutes, which commonly are repeated verbatim in the local civil service rules.

are "similar in scope, structure and authority" to the independent and powerful State Personnel Board. City of Bellevue, Decision 839, supra. We find that a broad reading of RCW 41.56.030(1), so as to make the statute applicable in this case to a "commission" that is created, appointed, funded, staffed and acting on behalf of the City of Bellevue is entirely consistent with the broad application given that statute by the Supreme Court. See, also, Zylstra v. Piva, 85 Wn.2d 743 (1975), where the Supreme Court expressly sought to preserve for the affected employees "as large a sphere of collective bargaining as possible, in accord with the stated purpose of the bargaining act".[4]

Conflict Between Chapters 41.08 and 41.56 RCW

The employer maintains that Chapter 41.08 RCW authorizes the Bellevue Civil Service Commission to adopt the rules changes at issue here. We agree, but the inquiry does not end there.

The employees in Bellevue have chosen to organize for the purposes of collective bargaining under Chapter 41.56 RCW, and they have designated the union as their exclusive bargaining representative. Chapter 41.56 RCW requires bargaining by employers with regard to mandatory subjects of bargaining, including many of the topics involved in the disputed rules changes.

If there is a conflict between the provisions of Chapter 41.08 RCW and the provisions of Chapter 41.56 RCW, the latter must prevail. RCW 41.56.950 provides:

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[4] We do not agree with the Examiner's alternative conclusion that the Bellevue Civil Service Commission is, itself, a municipal corporation and, therefore, a "public employer" under RCW 41.56.020. We do not find that the Bellevue Civil Service Commission has the necessary powers or other attributes to be considered a "public employer" in its own right. This difference of view does not, however, change the outcome of the case.

> The provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to accomplish their purpose. Except as provided in RCW 53.18.015, if any provision of this chapter conflicts with any other statute, ordinance, rule or regulation of any public employer, the provisions of this chapter shall control.

That statute was interpreted in Rose v. Erickson, 106 Wn.2d 420 (1986), where the Supreme Court held that a deputy sheriff was not limited to a "civil service" remedy in a discipline case, and that he was entitled to pursue the grievance and arbitration procedures of a collective bargaining agreement applicable to his employment. The civil service statute involved there, RCW 41.14.080, was found to be inconsistent with Chapter 41.56 RCW and, relying upon the clear legislative directive of RCW 41.56.905, the Court held that the collective bargaining law prevailed. The employee thus retained the alternative avenue of redress through collective bargaining, even though it conflicted with one of the most fundamental provisions of the civil service law.

Our conclusion here does not mean that civil service systems are dead, and we find no merit to the employer's contention that the Examiner ruled that Chapter 41.08 RCW was repealed by implication. The doctrine of repeal by implication is well established; the city correctly points to decisions holding that repeals by implication are disfavored. But those precedents are inapposite, as neither the Examiner nor this Commission have ruled that Chapter 41.08 RCW is deemed repealed. We simply find, consistent with Chapter 41.56 RCW and Rose v. Erickson, supra, that RCW 41.56.905 causes Chapter 41.56 RCW to prevail over Chapter 41.08 RCW to the extent that they conflict. Our ruling here does not prevent a body having jurisdiction to do so from promulgating civil service rules with respect to any subject for employees who are not represented for the purposes of collective bargaining. Nor does our ruling here prevent such a body from promulgating civil service rules for

represented employees with respect to matters that are not mandatory subjects of collective bargaining.

Nor does our conclusion here represent a frontal attack on civil service systems. The Supreme Court stated in Rose that "apparent conflicts in statutes should be reconciled and effect given to each if this can be achieved without distortion of the language used",[5] and we have previously followed the same principle in seeking to harmonize seemingly inconsistent statutes to avoid conflicts. See, METRO, Decision 2845-A (PECB, 1988).[6] Situations could arise where there is no conflict between Chapter 41.08 RCW and Chapter 41.56 RCW. Certainly, if the civil service commission adopts new rules on mandatory subjects only after the employer had satisfied its bargaining obligation, and the rules adopted are consistent with what occurred in the collective bargaining process, there would be no conflict.

No action or omission by the Bellevue Civil Service Commission, per se, creates a problem here. It is the failure of the City of Bellevue to bargain that we scrutinize. We could simply order the city to bargain with the union before the rules are put into effect. The city appears to argue, however, that it has no control over when the Civil Service Commission implements its rules. Therefore, we believe there is a statutory conflict. Our ruling simply prevents an employer from implementing such rules concerning mandatory bargaining subjects for union-represented employees until it satisfies its bargaining obligation under the Public Employees' Collective Bargaining Act. The employer has shown no good reason why it should be able to do indirectly what it cannot lawfully do

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[5] 106 Wn.2d at 424.

[6] See, also, Mason County, Decision 2307-A (PECB, 1986), where we attempted to harmonize the obligations of the collective bargaining statute with the open-public meetings law.

directly -- i.e., make changes of work rules or working conditions without any opportunity for bargaining. The fact that the instrumentality changing the conditions of employment -- the Civil Service Commission -- is not totally controlled by the city does not allow the City of Bellevue to evade its bargaining obligation.

Attorney Fees

We do not concur with the Examiner's characterization of the employer's contentions as, inter alia, "nonsense". The employer has not simply re-argued contentions which it argued and had rejected in earlier cases. There is little Commission precedent involving extensive discussion or interpretation of the phrase "acting on behalf of" that is contained in RCW 41.56.030(1). Consequently, we do not believe an extraordinary remedy is necessary to effectuate our order. Nor is there sufficient evidence in the record of a patent disregard for the duty to bargain in good faith for us to impose an extraordinary remedy.

NOW, THEREFORE, it is

ORDERED

1. The Examiner's findings of fact, conclusions of law and order are affirmed and adopted as the findings of fact, conclusions of law and order of the Commission, except for the following portions, which are stricken:

   (a) Paragraph 5 of the Examiner's findings of fact;

   (b) Paragraph 3 of the Examiner's conclusions of law; and

   (c) The award of attorney fees to the union.

2. The City of Bellevue, its officers and agents, shall immediately:

A. Post, in conspicuous places on the employer's premises where notices to affected employees are usually posted, copies of the notice attached hereto. Such notices shall, after being duly signed by an authorized representative of the respondent, be and remain posted for sixty (60) days. Reasonable steps shall be taken by the respondent to ensure that said notices are not defaced, removed, altered, or covered by other material.

B. Notify the complainant, in writing, within 30 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the complainant with a signed copy of the notice required by this Order.

C. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 30 days following the date of this Order, as to what steps have been taken to comply herewith, and at the same time provide the Executive Director with a signed copy of the notice required by this Order.

ISSUED at Olympia, Washington, this 30th day of January, 1990.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Janet L. Gaunt

JANET L. GAUNT, Chairperson

Mark C. Endresen

MARK C. ENDRESEN, Commissioner

Joseph F. Quinn

JOSEPH F. QUINN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A HEARING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL withdraw changes to the civil service rules adopted on November 2, 1987, to the extent that they involved mandatory subjects of collective bargaining affecting employees represented by International Association of Fire Fighters, Local 1604, and will restore the conditions which existed prior to that time.

WE WILL NOT refuse to give notice to and, upon request, bargain in good faith with International Association of Fire Fighters, Local 1604, concerning changes of civil service rules affecting the wages, hours and working conditions of employees represented by Local 1604.

WE WILL NOT, in any other manner, interfere with, restrain or coerce our employees in the exercise of their right to bargain collectively through representatives of their own choosing.

CITY OF BELLEVUE

By:_____
Authorized Representative

Dated:_____

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by other material. Any questions concerning this notice or compliance with its provision may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, Olympia, Washington 98504. Telephone: (206) 753-3444.